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No. 87-1672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEE SECK MON, DELIA CHAN WAI SHEUNG AND FAMOUS HORSE GARMENT FACTORY, LTD.,
Petitioners,
vs.
GUESS?, INC., GEORGES MARCIANO, MAURICE MARCIANO, ARMAND MARCIANO AND PAUL MARCIANO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

PETITIONERS' BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. DAVID JACOBS*
Coudert Brothers
Suite 4600
707 Wilshire Boulevard
Los Angeles, California 90017
(213) 688-9088
Attorneys for Petitioners

*Counsel of Record

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

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I.

THE DECISION BY THE CALIFORNIA SUPREME COURT DENYING REVIEW IS A "FINAL" JUDGMENT.

The federal question raised by the instant petition is whether the California Court has the power to proceed with and determine a controversy concerning the alleged copying of respondents' production materials. The decision by the California Supreme Court denying review is a final judgment in upholding the question of a state court's

jurisdiction to deal with a controversy which is beyond its power and which lies exclusively within the federal system.

While it is generally true that to be reviewable a state court judgment must be an "effective determination of the litigation and not of merely interlocutory or intermediate steps therein," this Court has applied a practical interpretation to the question of finality, and has found strong policy reasons for reviewing interlocutory state court judgments on questions of preemption as final within the meaning of 28 U.S.C. § 1257.

The jurisdictional determination presented here is as final and reviewable as was the judgment by the Supreme Court of Georgia in *Construction Laborers v. Curry*, 371 U.S. 542 (1963). The preemptive issue presented therein to the Court was held to be a "matter wholly separate and independent of the merits" of the legality of the picketing, thus making the judgment final and reviewable. *Accord*, *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963).

A similar result was reached in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) wherein this Court held that a state court judgment finding state causes of action in a labor dispute were not preempted was final within the meaning of 28 U.S.C. § 1257. In *Belknap*, this Court reasoned as follows:

> ". . . it finally disposed of the federal preemption issue; a reversal here would terminate the state court action; and to permit the proceedings to go forward in the state court without resolving the preemption issue would involve a serious risk of eroding the federal statutory policy of 'requiring the subject matter of Respondents' cause to be heard by the . . . Board, not by the state courts.' " *Belknap, Inc. v. Hale, supra*, 463 U.S. 491, 497, fn. 5.

Granting the instant petition would also be consistent with those categories of cases identified by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975), where a pragmatic approach led this Court to find finality, despite the fact that there were further proceedings yet to occur in the state court. The fourth category identified in *Cox* in which interlocutory review is permitted are those cases where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and when failure to consider the state court decision immediately "might seriously erode federal policy." (*Id.* at 482-83.) To accept respondents' argument would result in the complete erosion of both the letter and purpose of 17 U.S.C. § 301, in that a party could evade the mandate of preemption by artful pleading.

Moreover, in the instant case, although certain limited federal issues, *viz.* trademark infringement and civil RICO, may remain to be resolved in the trial court regardless of this Court's disposition of the preemption issue, it cannot be disputed that the preemption issue is final with respect to the state court. Petitioners respectfully submit that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine the question of preemption of the copying aspects of this case now, rather than to subject the parties to a long and complex litigation which may all be for naught if consideration of this question is postponed until the conclusion of these proceedings. *See, Mercantile National Bank v. Langdeau, supra.*

This Court's jurisdiction rests on the "understandable principle that where the proper forum for trying the issue joined in the state courts depends on the resolution of the federal question raised on appeal, sound judicial administration requires that such a question be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation." *Cox Broadcasting Corp. v. Cohn,*

supra, 420 U.S. at 506 (dissenting opinion), cited with approval in *Belknap, Inc. v. Hale, supra*, 463 U.S. at 498, fn. 5. Therefore, the state court judgment of which Petitioners seek review is to be considered final, and this Court possesses jurisdiction to grant the instant petition.

CONCLUSION

For the reasons stated above, and those contained in the Petition, Petitioners request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

R. DAVID JACOBS*
Coudert Brothers
Attorneys for Petitioners

*Counsel of Record